

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 28TH JULY 2006 / 6TH SRAVANA 1928

CRL.A.No. 1453 of 2006

**M.C. NO. 8/2006 IN SC.348/2001 of ADDL. SESSIONS
COURT (ADHOC II) KASARAGOD.**
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APPELLANTS/COUNTER PETITIONERS/SURETIES:

- 1. NARAMBAN, S/O. BAIRAN,
CHEYAMKAYIL HOUSE, MANIMOOLA P.O.,
BANDADKA, KASARAGOD.**
- 2. NANU NAIK, S/O. MANDU NAIK,
THADICHIPARA HOUSE, MANIMOOLA BANDADKA,
KASARAGOD.**

BY ADV. SRI. I.V. PRAMOD

RESPONDENT/COMPLAINANT:

**STATE OF KERALA, (ADDITIONAL SESSIONS
JUDGE), REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SRI. K.J. GEORGE.

**THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION
ON 28/07/2006, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

K. HEMA, J.

Crl. Appeal No. 1453 OF 2006

Dated this the 28th day of July, 2006.

J U D G M E N T

Appellants are the sureties of accused No. 10 & 13 in a Sessions Case. It appears that they executed a bond along with the accused for appearance of the accused before the court. But on failure of the accused to appear in court, proceedings were initiated against them under Section 446 of the Code of Criminal Procedure. Sureties sought time for production of the accused, but since they were unable to produce the accused, the court recorded that the bond has been forfeited and a penalty was imposed on them at Rs.10,000/- each. The court also found that if the amount cannot be realized from the appellants, they will have to undergo imprisonment in civil prison for a period of one month each. The said order is under challenge in this appeal.

2. Learned counsel appearing for the appellants submitted that the 10th accused was bedridden consequent to a fall from a coconut tree. Hence he is not even able to move out and is still on water bed. On getting notice from the court, the appellants went in search of the accused and this information was collected and the police was also informed about this. The warrant issued by the court was executed by

the police with the aid of the appellants, as informed by them. Learned counsel appearing for the appellants submitted that the court below failed to look into the circumstances under which the appellants were unable to produce the accused.

3. It was not possible for the appellants to produce the accused and the accused was not in a position to move out. This fact is recorded in the proceeding sheet itself. It is seen recorded that the warrant is returned with an endorsement that it is not possible to arrest and produce the accused, since he is bed ridden due to a fall from coconut tree. Matter is being so, the absence of the accused himself is not willful. He could not have appeared before the court and therefore, the initiation of the proceeding itself was not legal.

4. On going through the order under challenge it can be seen that the court has not considered the circumstance under which the accused were absent. The court has not ascertained under what circumstances the accused failed to appear before the court. It does not appear from the order under challenge that the court was satisfied that there was willful default from the part of the accused to appear in court. In the proceeding under Section 446 of the Code of Criminal Procedure, the court must record proof of satisfaction of the fact that the bond has been forfeited. For this, the court must enter a

finding that the bond has been forfeited and it should also seek proof for such satisfaction. Bond can be forfeited only by a willful conduct or by a default from the side of the accused. Had the court exercised its jurisdiction under Section 446 of the Code of Criminal Procedure properly all the relevant facts could have been ascertained and ensured.

5. But there is nothing in the order to show that the court recorded "proof of satisfaction of the fact that the bond has been forfeited". The mere recording of the fact that the bond has been forfeited will not have sufficient compliance of Section 446(1) of the Code of Criminal Procedure. There must be proof of satisfaction and such proof must be recorded. That apart, reason shown by the court below that the sureties had no explanation and no reason is assigned to hold that the bond has been forfeited. The order does not even show whether the court has taken any steps to satisfy itself whether the accused have defaulted so as to forfeit the bond. It is only in cases where the absence is with a view to forfeit the bond, the bond can be forfeited. In the above circumstances, the order which is not in compliance with Section 446(1) of the Code of Criminal Procedure cannot be sustained.

Learned counsel appearing for the appellants also submitted that the 13th accused had already appeared before the court and the sureties did not get sufficient time to produce him. The court has not also looked into the question why there was failure on the part of the 13th accused. Since there is no compliance on Section 446(1) of the Code of Criminal Procedure, the imposition of penalty on the appellants also is not legal. The order passed directing the appellants to undergo imprisonment in civil prison is also premature and not sustainable. The order under challenge is therefore set aside.

The appeal is allowed.

K. HEMA, JUDGE.

smp